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Objection Deadline: April 4, 2013 at 4:00 p.m. (ET)

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**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

In re:)	Chapter 11
)	
ATARI, INC., <i>et al.</i> ,)	Case No. 13-10176 (JMP)
)	
Debtors. ¹)	(Jointly Administered)

**MOTION FOR ENTRY OF AN ORDER AUTHORIZING THE DEBTORS TO ADOPT
AND IMPLEMENT (I) A SALE INCENTIVE PLAN AND (II) A LOYALTY PLAN**

The above-captioned debtors and debtors in possession (collectively, the “*Debtors*” or the “*Company*”) seek entry of an order, substantially in the form attached hereto as **Exhibit A**, pursuant to sections 105(a), 363(b)(1) and 503(c)(3) of title 11 of the United States Code (the “*Bankruptcy Code*”), authorizing the Debtors to adopt and implement (i) a postpetition sale incentive plan (the “*Sale Incentive Plan*”) and (ii) a loyalty plan (the “*Loyalty Plan*”) and together with the Sale Incentive Plan, the “*Incentive Plans*”) to benefit the Participating

¹ The Debtors are: Atari, Inc.; Atari Interactive, Inc.; Humongous, Inc.; and California U.S. Holdings, Inc.

Employees (as defined below). In support of the Motion, the Debtors respectfully represent as follows:

PRELIMINARY STATEMENT

1. The Debtors currently are seeking to maximize the value of their estates through a comprehensive sale process (the “*Sale Process*”) of all or substantially all of their assets (the “*Assets*”), including the Debtors’ iconic brands and intellectual property portfolio. The Sale Process has generated significant interest, with more than more than 80 potential buyers having executed or negotiated non-disclosure agreements for access to the Debtors’ virtual data room (the “*Data Room*”) created to assist the buyers with their due diligence. Given the level of interest in the Assets and the Debtors’ business, the Debtors’ ability to preserve value for their estates is dependent upon the continued employment and dedication of the Participating Employees who possess the knowledge, experience and skills necessary to assist with the Sale Process, the Debtors’ ongoing operations and these bankruptcy proceedings. Recognizing the need to retain the Participating Employees, the Debtors, in consultation with their advisors, have formulated (i) the Sale Incentive Plan, pursuant to which they propose to make results driven incentive payments to the three officers of the Company and six senior-level management employees (collectively, the “*Sale Incentive Plan Participants*”) and (ii) the Loyalty Plan, pursuant to which the Debtors propose to make payments to “rank and file” employees (the “*Loyalty Plan Participants*”) and together with the Sale Incentive Participants, the “*Participating Employees*”).

2. The Incentive Plans are designed to minimize the need or desire for the Participating Employees to seek other employment, which otherwise would distract them from the necessary tasks they need to perform for the Debtors. The Incentive Plans, therefore, are

essential to the success of the Sale Process and the continued operation of the Debtors' business during these chapter 11 cases.

JURISDICTION

3. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2). Venue in this Court is proper pursuant to 28 U.S.C. §§ 1408 and 1409. The statutory bases for the relief requested herein are Bankruptcy Code sections 363(b)(1), 503(c)(3) and 105(a).

BACKGROUND

4. On January 21, 2013 (the "*Petition Date*"), each of the Debtors filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code. The Debtors continue to operate their business and manage their properties as debtors in possession pursuant to Bankruptcy Code sections 1107(a) and 1108. No request for the appointment of a trustee or an examiner has been made in these cases.

5. By an order entered on January 24, 2013, the Debtors' chapter 11 cases have been consolidated for procedural purposes only and are being jointly administered [Docket No. 27]. On February 6, 2013, the United States Trustee for the Southern District of New York (the "*U.S. Trustee*") appointed the Official Committee of Unsecured Creditors (the "*Committee*") in these chapter 11 cases [Docket No. 64].

6. On March 7, 2013, the Court entered a final order [Docket No. 125] approving the senior secured super priority financing (the "*DIP Facility*") provided by Alden Global Value Recovery Master Fund, L.P. ("*Alden*" or the "*DIP Lender*").

THE SALE PROCESS

7. The Debtors, through their investment banker, Perella Weinberg Partners ("*PWP*"), are aggressively seeking buyers for all or substantially all of the Assets. To date, PWP

has contacted more than 150 prospective buyers, more than 80 of whom (the “*Potential Buyers*”) have executed or are negotiating non-disclosure agreements for access to certain confidential information so they may properly evaluate the Assets. The Potential Buyers include both financial and strategic buyers, the latter category comprising both gaming and non-gaming companies. In addition to the Assets, a number of the Potential Buyers have expressed interest in purchasing the Company as a “going concern”, including the ability to retain some or all of the Company’s employees.²

8. As part of the Sale Process, the Debtors and PWP rely on the Participating Employees to gather diligence materials and prepare detailed business plans for each of the Company’s business units, and historical and forecasted financial information in a customized, bidder-friendly format to enable the Potential Buyers to properly evaluate the Assets. As the Potential Buyers navigate through the Data Room and formulate their bids, these employees need to be available to answer questions and respond to additional diligence requests from the Buyers. Even after the initial bids are submitted, and as the Debtors and PWP engage in negotiations with the Potential Buyers, some of the Participating Employees will be requested to participate in the management presentations while others will be required to work behind the scenes to continue to respond to diligence requests from the Buyers.

9. During this time, it also will be vital that the Participating Employees work diligently to ensure that the Company is operating effectively on a day-to-day basis in order to protect its value as a “going concern”, and, concomitantly, its attractiveness to Potential Buyers.

10. The Debtors ability to preserve value for their estates, then, is dependent upon the continued dedication and loyalty of the Participating Employees. Since the Petition Date, the

² Indeed, to Potential Buyers who are non-gaming companies, the availability of a trained and dedicated workforce likely will be a paramount consideration.

Debtors have lost over 15% of their workforce, including the Company's chief technology officer, another department head, and two of the Company's top game software producers. With only approximately 40 employees remaining, further depletion of the Debtors' workforce would have a detrimental effect on the Debtors' ability to conduct, and maximize value from, the Sale Process and continue to operate as a "going concern". The Participating Employees undoubtedly are concerned about the impact that the bankruptcy and the Sale Process will have on their short and long-term employment prospects with the Debtors. Recognizing the importance of the Participating Employees to the Sale Process, the Debtors' operations, and, ultimately, the value of the estates, the Debtors, with the assistance and support of their advisors, have developed and adopted the Incentive Plans. The Debtors have also obtained the DIP Lender's consent for the Incentive Plans. The Incentive Plans divide the Participating Employees into two categories—the first category, the Sale Incentive Plan Participants, includes those employees who have the knowledge and expertise necessary to *lead* the Sale Process and the ongoing operations of the Debtors' business to maximize value of the Debtors' estates, and the second category, the Loyalty Plan Participants, includes employees who will *support*, and have the institutional knowledge and experience to assist in, these efforts.

DESCRIPTION OF THE INCENTIVE PLANS

A. *The Sale Incentive Plan*

11. The Sale Incentive Plan proposes to make incentive payments, upon achieving certain sale results in these cases and the closing of the Sale transaction, to nine Sale Incentive Plan Participants whose roles are integral to maximizing value through the Sale Process. Given the Incentive Plan Participants' in-depth knowledge of the Debtors' business operations, and, in particular, the Debtors' unique assets, the Sale Plan Participants are vital to the Sale Process. In

addition, once the Sale Process is complete, these employees will be instrumental in ensuring a smooth transition of the Assets to the ultimate buyer or buyers.

12. The Sale Process is managed internally by James Wilson, Chief Executive Officer, Kristen Keller, General Counsel, and Robert Mattes, Chief Financial Officer (collectively, the “*Participating Executives*”). Mr. Wilson is responsible for the oversight of the Company’s day-to-day business operations and these bankruptcy proceedings, and is a member of the Debtors’ board of directors. With respect to the Sale Process, he is instrumental in attracting Potential Buyers to the Sale Process and managing the development of the strategy, business plans, forecasts and presentations for use in the Sale Process. Mr. Wilson also will present the business plans and lead the management presentations to the Potential Buyers.

13. Ms. Keller manages the day-to-day legal functions of the Company, which includes oversight over the drafting and negotiation of all agreements, protection and maintenance of the Company’s intellectual property portfolio, compliance with regulatory matters and oversight of human resources and litigation matters. With respect to the Sales Process, Ms. Keller has responsibility for providing diligence materials and providing answers to questions and inquiries from the Potential Buyers regarding legal, regulatory and human resources matters. Ms. Keller also will participate in the management presentations to the Potential Buyers.

14. Mr. Mattes manages the Company’s finance and technology functions. His responsibilities include maintaining and updating the Company’s financial books and records and overseeing the Company’s accounts payable and receivable, payroll and taxes. With respect to the Sales Process, he is instrumental in developing forecasts used in the business plans and

will be required to respond to detailed financial questions from the Potential Buyers. Like Ms. Keller, Mr. Mattes will take part in the management presentations.

15. In short, the Participating Executives will be the “face of the company” to Potential Buyers. Each will play a unique and integral role in the Sales Process and will be instrumental in maximizing the proceeds realized therefrom. Under the Sale Incentive Plan, each Participating Executive is eligible to receive a small base award upon the full repayment of the DIP Facility. In addition, Mr. Wilson is eligible to receive a percentage of the sale proceeds, which percentage will increase as certain sale result milestones are achieved, provided that the Sale generates more than the minimum sale price set forth in **Exhibit B**. Further, Ms. Keller and Mr. Mattes are each eligible to receive a percentage of their respective base salary, which percentage will increase as certain sale benchmarks are satisfied, once the minimum sale price set forth in **Exhibit B** is realized. The relevant sale result milestones and the incentive payment calculations with respect to each Participating Executive are set forth in **Exhibit B** hereto.

16. In addition to the Participating Executives, six senior management-level, non-insider employees (collectively, the “*Senior Employees*”) are eligible to participate in the Sale Incentive Plan due to the unique and specialized role they each play within the Company. Specifically, Emily Clock, Todd Shallbetter and Anthony Jacobson are the Company’s primary revenue producers. Ms. Clock is responsible for growing and maintaining the Company’s “licensing-out” business and Mr. Shallbetter manages the Company’s digital distribution business, including interfacing with distribution partners to maintain and develop programs and initiatives to maximize revenue. Mr. Jacobson is the Company’s senior vice president for business development and has been instrumental in identifying and attracting several of the Potential Buyers because of his strategic relationships with these Buyers. Because of their skills,

experience, institutional knowledge and industry contacts, Ms. Clock, Mr. Shallbetter and Mr. Jacobson will each assume a central role in the presentations to the Potential Buyers.

17. Additionally, Joel Fashingbauer, who oversees product development and production management for the Company's games, has helped develop many of the business plans and the management presentations. Further, Robert Spellerberg, who is responsible for risk management and collections with respect to the Company's retail business, is instrumental in maximizing value from the sale of the Debtors' remaining inventory and minimizing any exposure associated with the close-out of the retail business. Finally, Giancarlo Mori leads the Company's creative team and has been actively involved in the drafting and preparation of all the materials for the management presentations.

18. Because of the instrumental role that each Senior Employee has played and will continue to play in ensuring the success of the Sale Process, each Senior Employee is eligible to receive incentive payments upon reaching certain sale result milestones in the amounts set forth on **Exhibit B**.

19. The Debtors believe that the Sale Incentive Plan is appropriately tailored to incent the Sale Incentive Plan Participants to continue to perform their functions at the levels necessary to maximize the value of the Assets throughout the Sale Process and sustain the Debtors' business operations during the chapter 11 process.

B. *The Loyalty Plan*

20. In addition to the Sale Incentive Plan, the Debtors seek to adopt and implement the Loyalty Plan, which is available to the Debtors remaining employees not covered by the Sale Incentive Plan. Under the Loyalty Plan, each Loyalty Plan Participant will receive a pre-determined award, as detailed in **Exhibit C** attached hereto, based on such employee's position, tenure and specific responsibilities. Such award shall vest and be paid upon the involuntary

termination of the Loyalty Plan Participant's employment by the Debtors at any point during the chapter 11 cases.

21. The Debtors submit that approval of the Loyalty Plan is in the best interests of the estates and their creditors given the vital role that each of these employees continue to play in sustaining the Company's business operations during this critical time. Specifically, the Loyalty Plan Participants perform the following important functions for the Company:

- **Marketing:** promoting the Atari brand and the Company's products and games, designing artwork and maintaining online community relationships and the Company's database of registered users.
- **Production & Development:** developing the Company's mobile games and monitoring external development of game design and features, quality, deployment, metrics/analytics, game monetization and user acquisition.
- **Finance:** managing the Company's finance, reporting, payables, receivables and royalty collection functions, and budgeting, forecasting and providing oversight of assessments of tax liabilities and payments thereon.
- **Legal:** reviewing and drafting agreements, maintaining contract databases, providing advice related to contractual obligations, maintaining and protecting the Company's intellectual property, assisting in the management of litigation, ensuring compliance with regulatory requirements and drafting and maintaining privacy policies and terms of use.
- **Database/Websites/Technology:** managing the Company's databases and websites and providing general technical guidance to the Company, as well as responding to, and executing, regulatory and industry requests for changes to the Company's websites.
- **Human Resources:** managing the Company's human resources and benefits programs, addressing employment-related questions, providing support to managers in handling employee related issues, providing risk analyses related to Company policies and practices, and performing the Company's payroll functions.
- **Quality Assurance/Customer Service:** managing the quality assurance, including creating and managing test plans, managing external test companies, managing the archive and customer service functions of the Company, and providing technical support to the digital distribution business.
- **Business Development/Licensing:** developing and maintaining the Company's licensing business, responding to request for permission to use the Company's products and providing oversight of licensees, including maintenance of the Company's style guide.

- ***Retail Sales & Distribution***: managing the sale of existing retail inventory, overseeing risk management associated with major retailers and managing the Company's retail distribution relationships.

22. As discussed herein, the Debtors' ability to preserve the value of the Company as a "going concern" is dependent upon the continued employment, active participation and dedication of the Loyalty Plan Participants who perform the foregoing functions. The uncertainty surrounding the future of the Company and the additional burdens that have been imposed on the Loyalty Plan Participants as a result of the bankruptcy filing and employee resignations, has led to reduced employee morale. The implementation of the Loyalty Plan will boost morale by (i) sending a strong signal to the Loyalty Plan Participants that their services are valued and (ii) providing the Loyalty Plan Participants with the appropriate incentive to remain focused on performing the foregoing tasks rather than seek alternative employment. Furthermore the Loyalty Plan will provide the Loyalty Plan Participants with some financial security in the event the Company determines that a reduction in workforce is appropriate or necessary based upon the initial indications of interest that the Company receives from the Potential Buyers.

C. *Estimated Cost of the Incentive Plans*

23. The Debtors submit that the cost of the Incentive Plans, measured both on a dollar basis and a percentage basis, is reasonable and appropriate under the unique facts and circumstances of these chapter 11 cases. Specifically, under the Sale Incentive Plan, the aggregate amount of payments to the Participating Executives upon the repayment of the DIP Facility equals \$72,000. No additional payments would accrue under the Sale Incentive Plan until the minimum sale price set forth in **Exhibit B** is achieved. Thereafter, the payments would

increase upon the realization of additional sale milestones as set forth in **Exhibit B**. Additionally, the maximum cost for Loyalty Plan is \$743,000.

D. *Limitations on Incentive Plan Payments*

24. The Debtors do not intend to reduce the value of their estates by providing the Participating Employees with a double recovery on account of both prepetition employee benefits and any benefits offered under the Incentive Plans. To the extent a Participating Employee elects to receive compensation under the Incentive Plans, such employee will be required to waive any employment-related claims that he/she may assert against the Debtors.

25. Additionally, any Participating Employee who voluntarily leaves the Debtors' employment before the specific eligibility milestones set forth in **Exhibits B and C** have been satisfied will forfeit such employees' right to future payment under the Incentive Plans. In such a case, any amounts that otherwise would have been payable to a Participating Employee but are not paid due to such employee's voluntary resignation will be returned to the Debtors' estates and available for distribution to the Debtors' creditors.

RELIEF REQUESTED

26. By this Motion, the Debtors seek authorization, pursuant to Bankruptcy Code sections 363(b)(1), 503(c)(3) and 105(a), to adopt and implement the Sale Incentive Plan and the Loyalty Plan to incentivize the Participating Employees to continue to provide essential services to the Debtors during the Sale Process and these bankruptcy proceedings. As discussed more fully below, the adoption and implementation of the Incentive Plans (a) is an appropriate exercise of the Debtors' business judgment, (b) is necessary and in the best interests of the Debtors, their estates and creditors and (c) should be approved pursuant to Bankruptcy Code sections 363(b)(1), 503(c)(3) and 105(a).

BASIS FOR RELIEF REQUESTED

A. *The Incentive Plans Should Be Approved As A Valid Exercise Of The Debtors' Sound Business Judgment Under Bankruptcy Code Section 363(b)(1)*

27. Bankruptcy Code section 363(b)(1) provides, in pertinent part, that “[t]he trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate” 11 U.S.C. § 363(b)(1). Although, Bankruptcy Code section 363 does not set forth a standard for determining when it is appropriate for a court to authorize the use, sale, or lease of estate property outside the ordinary course of business, applicable case law provides that a bankruptcy court should approve a transaction that is out of the ordinary course of a debtor’s business if the debtor can demonstrate that it exercised sound business judgment in entering into the transaction. See, e.g., Official Comm. of Unsecured Creditors of LTV Aerospace and Defense Co. v. LTV Corp. (In re Chateaugay Corp.), 973 F.2d 141, 143 (2d Cir. 1992) (finding that “a judge determining a 363(b) application [must] expressly find from the evidence presented before him at the hearing a good business reason to grant such application”); In re Global Crossing Ltd., 295 B.R. 726, 743-744 (Bankr. S.D.N.Y. 2003).

28. Once the debtor has articulated a valid business justification for a particular form of relief, a presumption arises that the debtor’s decision was made on an informed basis, in good faith, and in the honest belief that the action was in the debtor’s best interest. See Official Comm. of Subordinated Bondholders v. Integrated Res., Inc. (In re Integrated Res, Inc.), 147 B.R. 650, 656 (S.D.N.Y. 1992). Furthermore, “[w]here the debtor articulates a reasonable basis for its business decisions (as distinct from a decision made arbitrarily or capriciously), courts will generally not entertain objections to the debtor’s conduct.” Committee of Asbestos-Related Litigants v. Johns-Manville Corp. (In re Johns-Manville Corp.), 60 B.R. 612, 616 (Bankr.

S.D.N.Y. 1986). Objections to such decisions will only be entertained when they allege “bad faith, self-interest, or gross negligence.” Integrated Resources, Inc., 147 B.R. at 656.

29. The Debtors submit that the Incentive Plans reflect a proper exercise of the Debtors’ business judgment. In addition to their ordinary course activities, the Participating Employees are now tasked with providing the highest level of services under extraordinary stress resulting from the employee turnover and increased responsibilities, all in the face of an uncertain future. Moreover, the Participating Employees must work expeditiously with the Debtors’ advisors to assist them with the Sale Process, the Debtors’ ongoing operations and these bankruptcy proceedings. The skills and knowledge that the Participating Employees possess, and their motivation to remain in the Debtors’ employ, are essential to maximizing the value of the Debtors’ estates by maintaining uninterrupted operation of the Debtors’ business during this critical time. The Debtors believe that the Incentive Plans will properly provide an incentive to the Participating Employees to remain dedicated to their jobs and to perform to the best of their abilities through the restructuring and sale processes, which will enable the Debtors to properly exercise their fiduciary duties to maximize value for the benefit of their estates and creditors.

30. In similar cases, courts in this district have found that a debtor’s use of incentive programs can be a highly efficient means of maximizing value for a debtor’s estates and a valid exercise of a debtor’s business judgment. See, e.g., In re Dana Corp., 358 B.R. 567, 584-585 (Bankr. S.D.N.Y. 2006) (approving management incentive plan); In re Tronox Inc., No. 09-10156 (ALG) (Bankr. S.D.N.Y. June 9, 2009) (approving incentive payments for achievement of performance goals); In re PlusFunds Grp., Inc., No. 06-10402 (JMP) (Bankr. S.D.N.Y. Apr. 19, 2006) (granting debtor’s request to implement a sale-related incentive plan for six senior managers, payable upon a successful sale of substantially all of the debtor’s assets).

31. Here, the Debtors believe that the compensation proposed under the Incentive Plans will properly motivate the Participating Employees to maximize value for the Debtors' estates and creditors by working to obtain the highest and best price for the Assets through the Sale Process. Furthermore, the Debtors believe that the aggregate cost, scope and conditions of the Incentive Plans are reasonable given the unique facts and circumstances of these chapter 11 cases. The Debtors therefore submit that the decision to adopt and implement the Incentive Plans is a sound exercise of their business judgment and a proper use of the Debtors' resources under Bankruptcy Code section 363(b).

B. *Approval Of The Incentive Plans Is Consistent With Bankruptcy Code Section 503(c)*

32. Bankruptcy Code section 503(c) provides criteria for courts to use in approving certain types of payments to insiders and other transfers or obligations that are outside the ordinary course of business. See 11 U.S.C. § 503(c). By the Bankruptcy Code's plain language, however, section 503(c)(1) pertains solely to retention plans of insiders and section 503(c)(2) addresses only the requirements for severance plans for insiders; importantly, neither provision applies to *performance-based incentive plans* or to *non-insiders*. In addition, nothing in section 503(c) precludes a chapter 11 debtor from offering reasonable compensation or incentives to key employees (including insiders) for their contributions to a debtor's business and reorganization effort. Dana Corp., 358 B.R. at 576; see also In re Nellson Nutraceutical, Inc., 369 B.R. 787, 803-04 (Bankr D. Del. 2007).

i. Section 503(c)(1) Does Not Prohibit Approval Of The Incentive Plans

33. The Incentive Plans do not run afoul of Bankruptcy Code section 503(c)(1) because neither the Sale Incentive Plan nor the Loyalty Plan provides payments to insiders for the primary purpose of retention. Although the Sale Incentive Plan, in part, applies to insiders within the meaning of Bankruptcy Code section 101(31), Bankruptcy Code section 503(c)(1)

applies only if proposed compensation is (i) to an insider of a debtor and (ii) “for the purpose of inducing such person to remain with the debtor’s business.” 11 U.S.C. § 503(c)(1). By the plain meaning and conjunctive language of the statute, therefore, unless both of these factors are present, subsection 503(c)(1) does not apply. Thus, with respect to the Sale Incentive Plan, although the first prong (compensation to insiders) is implicated with respect to the Participating Executives, the second prong (for the purpose of retaining employees) is not; the Sale Incentive Plan is an incentive plan, with all compensation provided thereunder contingent upon the Debtors’ effecting a sale of their Assets. Because the amount of payments under the Sale Incentive Plan increase proportionally with the proceeds realized from the Sale, the Sale Incentive Plan Participants are incented to maximize value for the Debtors’ estates. Accordingly, the Sale Incentive Plan is designed to reward the Sale Incentive Plan Participants for the extraordinary efforts that will be required for the Debtors to successfully and timely complete the Sale Process, and is not a retention plan as contemplated by Bankruptcy Code section 503(c)(1).³ Likewise, section 503(c)(1) is inapplicable to the Loyalty Plan because none of the Loyalty Plan Participants are insiders.

ii. Section 503(c)(2) Does Not Prohibit Approval Of The Incentive Plans

34. In addition, Bankruptcy Code section 503(c)(2) is inapplicable to the Incentive Plans because none of the components of either the Sale Incentive Plan or the Loyalty Plan contain a “severance” payment to an “insider”. While certain of the potential incentive payments

³ Although it is true that an incentive plan may, as an ancillary benefit, encourage a debtor’s employees to remain in a debtor’s employ this, without more, does not transform an incentive plan to a retention plan. So long as the primary purpose of compensation is to provide an incentive, and the benefit is merely coincidental to retention, the incentive plan does not violate Bankruptcy Code section 503(c). See, e.g., In re Global Homes Prods., LLC, 369 B.R. at 786-87 (finding that the proposed incentive plans were “primarily incentivizing and only coincidentally retentive” and noting, “[t]he fact . . . that all compensation has a retention element” did “not reduce the Court’s conviction” that the Debtors’ primary goal in approving the incentive plans was “to create value by motivating performance”). Id.

provided to Senior Employees under the Sale Incentive Plan are calculated using a multiplier of the severance payment that such employees would have been eligible to receive under the Debtors' severance policy, such payments are fully dependent upon the success of the Sale Process, and the severance amounts were used merely as a guideline for computing the incentive payments. Such employees, however, are not insiders in any event and therefore the limitations of section 503(c)(2) would not apply. Likewise, Bankruptcy Code section 503(c)(2) is inapplicable to the Loyalty Plan because none of the Loyalty Plan Participants are insiders.

iii. The Incentive Plans Should Be Authorized Under Bankruptcy Code Section 503(c)(3)

35. To the extent that distributions under the Incentive Plans are payments "outside the ordinary course of business," they should be evaluated under Bankruptcy Code section 503(c)(3), which provides, in relevant part, that "there shall be neither allowed, nor paid . . . other transfers or obligations that are outside the ordinary course of business and not justified by the facts and circumstances of the case. . . ." 11 U.S.C. § 503(c). Courts analyzing various payments under section 503(c)(3) have held that the "business judgment" standard is the proper standard for determining whether incentive programs and the payments thereunder are justified. See, e.g., In re Dana Corp., 358 B.R. at 571 (agreeing that management incentive programs should be evaluated under the business judgment standard). As set forth above, the Debtors have demonstrated a sound business judgment for the adoption and implementation of the Incentive Plans, and they should be approved pursuant to Bankruptcy Code section 503(c)(3).

C. *The Incentive Plans Should Be Approved Under Bankruptcy Code Section 105(a)*

36. Bankruptcy Code section 105(a) empowers the Court to "issue any order, process, or judgment that is necessary to carry out the provisions of [the Bankruptcy Code]." 11 U.S.C. § 105(a). The Debtors believe that the Incentive Plans are critical to their ability to maximize

value for their estates and creditors. Specifically, the payments are essential to motivate the Participating Employees to preserve the Company as a “going concern” and dedicate themselves to ensuring that maximum value is achieved through the Sale Process. Simply put, the Incentive Plans are necessary and appropriate because, ultimately, they reward the Participating Employees for their commitment to the Debtors’ business and their efforts to bring value into these estates, and to retain such value for the benefit of all stakeholders.

NOTICE

37. Notice of this Motion has been provided to (a) the U.S. Trustee, (b) counsel to the Committee; (c) counsel to Alden; (d) counsel to Atari, S.A.; (e) the Internal Revenue Service; (f) the New York State Attorney General; and (g) all parties who have filed a notice of appearance or have requested services in these chapter 11 cases. The Debtors respectfully submit that no other or further notice need be provided.

NO PRIOR REQUEST

38. No prior motion for the relief requested herein has been made to this or any other court.

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WHEREFORE, the Debtors respectfully request that the Court (a) enter an order substantially in the form annexed hereto as **Exhibit A**, granting the relief requested herein, and (b) grant to the Debtors such other and further relief as the Court may deem just, proper and equitable

New York, New York
Dated: March 19, 2013

AKIN GUMP STRAUSS HAUER & FELD LLP

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EXHIBIT A

Proposed Order

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

In re:)	Chapter 11
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ATARI, INC., <i>et al.</i> ,)	Case No. 13-10176 (JMP)
)	
Debtors. ¹)	(Jointly Administered)
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**ORDER AUTHORIZING THE DEBTORS TO ADOPT AND IMPLEMENT
(I) A SALE INCENTIVE PLAN AND (II) A LOYALTY PLAN**

Upon the motion (the "Motion")² of the Debtors for entry of an order authorizing the Debtors to adopt and implement the Incentive Plans pursuant to Bankruptcy Code sections 363(b), 503(c) and 105(a); and it appearing that the relief requested is in the best interests of the Debtors' estates, their creditors and other parties in interest; and the Court having jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334; and it appearing that the relief requested herein being a core proceeding pursuant to 28 U.S.C. § 157(b); and it appearing that venue being proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409; and notice of the Motion appearing to be adequate and appropriate under the circumstances; and any objections to the requested relief having been withdrawn or overruled on the merits; and after due deliberation and sufficient cause appearing therefor,

IT IS HEREBY ORDERED THAT:

1. The Motion is granted to the extent set forth herein.
2. The Debtors are authorized, but not required, to (a) adopt and implement the Sale Incentive Plan and the Loyalty Plan and make any payments required thereunder and (b) take

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² Capitalized terms used but not otherwise defined herein shall have the meanings set forth in the Motion.

such other action as may be necessary to implement the Sale Incentive Plan and the Loyalty Plan.

3. The authorization granted herein to make payments to the Participating Employees under the Incentive Plans shall not create any obligation on the part of the Debtors or their officers, directors, attorneys or agents to make such payments, and none of the foregoing persons shall have any liability on account of any decisions by the Debtors not to honor the Incentive Plans.

4. Neither this Order nor any payment or performance by the Debtors authorized hereunder shall be deemed an assumption of any executory contract or otherwise affect the Debtors' rights under Bankruptcy Code section 365 to assume or reject any executory contract.

5. Notwithstanding the possible applicability of Bankruptcy Rules 6004(h), 7062 and 9014 or otherwise, the terms and conditions of this order shall be immediately effective and enforceable upon its entry.

6. The Debtors are authorized to take all actions necessary to effectuate the relief granted pursuant to this order in accordance with the Motion.

7. This Court shall retain jurisdiction with respect to all matters arising from or relating to the implementation of this order.

Dated: April __, 2013
New York, New York

THE HONORABLE JAMES M. PECK
UNITED STATES BANKRUPTCY JUDGE

EXHIBIT B

FILED UNDER SEAL

EXHIBIT C

FILED UNDER SEAL